IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 8, 2009 Session

TIMOTHY E. HAWKINS v. MARGARET MICHELLE O'BRIEN

Appeal from the Circuit Court for Sumner County
No. 26919-C C. L. Rogers, Judge

No. M2008-02289-COA-R3-CV - Filed July 15, 2009

In this post-divorce proceeding, the trial court modified the permanent parenting plan by designating Father as the primary residential parent and holding Mother in contempt for failing to pay the car note on the vehicle awarded Mother in the divorce for which Father was jointly liable. At the time of the divorce, Mother was designated the primary residential parent of the parties' minor child. Shortly after the divorce was final, Father filed a Petition for Change of Custody and Contempt. Father also filed a motion for an immediate temporary change in parenting responsibilities, and following a hearing on the motion, the trial court entered an order temporarily designating Father as the primary residential parent and restricting Mother's parenting time. Two years after the entry of the temporary order, the court conducted a final hearing on Father's petition. Following the final hearing, the trial court found that a material change in circumstances had occurred and it was in the child's best interest for Father to be designated the primary residential parent. The court also found Mother in contempt for failing to pay the note of the vehicle awarded her in the divorce as required of her in the Final Divorce Decree. Mother appealed. We affirm the modification of the parenting plan; however, we reverse the finding of civil contempt as the trial court made no findings of fact regarding Mother's ability to pay the financial obligation and the evidence is insufficient for this court to find that Mother had the ability to pay the note or that her failure to pay the note was a willful act of disobedience of the court's order.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Mike J. Urquhart, Nashville, Tennessee, for the appellant, Margaret Michelle O'Brien (Moore).

Joe Harsh, Gallatin, Tennessee, for the appellee, Timothy E. Hawkins, Sr.

OPINION

Timothy Hawkins and Margaret Michelle O'Brien[1] divorced in May 2006. The permanent parenting plan entered at the time of the divorce designated Mother as the primary residential parent, awarded the parents relatively equal parenting time, and designated that the decision-making regarding the child would be the joint responsibility of the parents.

Three months after the divorce decree was entered, on August 25, 2006, Father filed a Petition for Change of Custody and Contempt. He alleged that a material change in circumstances had occurred and that it was in the child's best interest for Father to be named the primary residential parent. Father specifically alleged that Mother had moved with their child from her previous residence and refused to provide Father with the physical address of where his child was currently residing.[2] Although Father did not know where they were, he suspected they were living with her new boyfriend in his parents' home in Marshall County, and was concerned for his child's welfare.[3] In the petition, Father also alleged that Mother had failed to make payments on the vehicle awarded her in the divorce decree, as the final decree required of her, stating that the lien holder had contacted him demanding payment on the note for which he was jointly liable, and Father asked that she be held in contempt for violating the divorce decree.

Six days after filing his petition, Father filed a motion seeking an immediate temporary change of parenting responsibilities due to his concerns for the child's welfare.[4] A hearing on Father's motion for an immediate temporary change of parenting responsibilities was held on September 25, 2006. Following the hearing, the trial court found that a substantial and material change in circumstances had occurred since the parties' divorce and ordered that Father be designated, temporarily, as the primary residential parent of the minor child. The trial court also restricted Mother's parenting time to every other weekend, and the court further required that the parenting time occur at the home of the maternal grandmother under the supervision of the grandmother. The trial court also issued a restraining order prohibiting Mother from having an unrelated male in her home from 8:00 p.m. to 9:00 a.m. when the child was present. The order, which was entered on September 25, 2006, also suspended Father's obligation to pay child support and the court reserved judgment on Mother's obligation to pay child support as well as all other issues pending further orders.

---

[1] Margaret Michelle O'Brien subsequently remarried and is now Margaret Michelle O'Brien Moore.

[2] It appears from the record that Mother's boyfriend moved to Marshall County to avoid being served with a warrant for his arrest in Nashville, and while it was not proven, this appears to be the reason Mother would not tell Father where the child was residing.

[3] Father's concern proved to be justified as a serious fight occurred in the home of the boyfriend's parents in Marshall County while Mother and the child were residing there. The fight was between the boyfriend's parents and the boyfriend. Following the fight, the boyfriend's parents were arrested; soon thereafter Mother, the child, and her boyfriend moved out of his parents' home.

[4] The motion for an immediate temporary change of parenting responsibilities was filed on August 31, 2006.

The case remained dormant for thirteen months, until October 29, 2007, when Father filed a motion to set the case for final hearing. It was not until after Father filed this motion that Mother filed her Answer to his petition and a Counter-Petition.[5] As a consequence of Father's motion and Mother's pleadings, the trial court conducted a hearing to review the status of the case, including the child support issue and restrictions on Mother's parenting time. This hearing occurred on November 15, 2007. At the conclusion of the hearing, the trial court ordered Mother to pay pendente lite child support of $571 per month starting December 2007. In the same order the court lifted the requirement that her visits with the child be supervised, granted Mother permission to take the child to New Hampshire for a week-long Thanksgiving holiday, and granted her another week of parenting time beginning Christmas morning.[6]

The December 27, 2007 order indicated that a hearing would be held sometime in January 2008 to "review" the amount of child support "based upon the status of the case." The record, however, indicates that there were no hearings in this case for the next eight months, until August 25, 2008, when the case first came on for final hearing.[7]

The final hearing was conducted over two days, August 25 and September 11, 2008. Both parties presented testimony and witnesses regarding the alleged changes in circumstances. At the close of the trial, the court requested that each party submit proposed findings of fact, conclusions of law, and a permanent parenting plan. The trial court issued its ruling in an order entered September 23, 2008, in which it found that a substantial and material change of circumstances had occurred. The court stated these changes included Mother moving to Lewisburg, Tennessee, Mother's financial problems and inability to provide a stable home for the child, and the inability of the Father and Mother to appropriately communicate as is necessary for joint decision-making, which the plan required. As for the statutory factors for determining whether a change of the residential parenting plan would be in the best interests of the child, the trial court found the factors weighed in favor of Father being named the primary residential parent. Accordingly, the court designated Father as the primary residential parent, and modified the parenting plan giving Mother parenting time every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday; holidays were split between the parents in alternating even and odd years; and each parent received half of the child's winter vacation. As for the child's spring and summer vacation, the court directed that the regular day-to-day schedule would apply. As a result of the above plan, Father was awarded parenting time of approximately 285 days a year and Mother 80 days of residential time a year.

---

[5] In her Answer and Counter-Petition, Mother set forth a number of facts that she argued should result in her being restored as the primary residential parent, and, or alternatively, to receive increased parenting time from the temporary order.

[6] The order from the November 15 hearing was not entered until December 27, 2007.

[7] The record does not expressly indicate that the planned January 2008 hearing did not take place; however, due to the lack of an order or other entry in the record, it appears that no hearing occurred. It further appears that order designating Father as the temporary primary residential parent was not revisited, nor was the issue of pendente lite child support, until the order was entered on September 23, 2008, following the conclusion of the final hearing on Father's petition on September 11, 2008.

Father was granted sole decision-making authority for educational decisions, non-emergency healthcare, religious upbringing, and extracurricular activities.

On the issue of contempt, the trial court held Mother in civil contempt for failing to pay the indebtedness on the car awarded to her in the divorce, and ordered Mother to pay Father a judgment of $11,383.82, the balance owing on the car note.

In her appeal, Mother contends the trial court erred in finding that a material change in circumstances had occurred and that it was in the child's best interest to alter the residential parenting time. Mother also contends the trial court erred in allocating substantially greater parenting time to Father and in changing the major decision-making authority to solely the Father. She also contends the court erred in finding her in civil contempt.

ANALYSIS

This court reviews decisions in divorce cases de novo with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols,* 792 S.W.2d 713, 716 (Tenn.1990). Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding parenting schedules.[8] *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). "Trial courts have broad discretion in devising permanent parenting plans and designating the primary residential parent. In reaching such decisions the courts should consider the unique circumstances of each case." *Burton v. Burton*, No. E2007-02904-COA-R3-CV, 2009 WL 302301, at *1 (Tenn. Ct. App. Feb. 9, 2009) (citing *Parker*, 986 S.W.2d at 563); *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). A trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Nelson*, 66 S.W.3d at 901 (citing *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997)).

Trial courts have broad discretion to fashion parenting plans that best suit the unique circumstances of each case. *Parker*, 986 S.W.2d at 563. Furthermore, it is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). Decisions regarding parenting schedules often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Thus, a trial court's decision regarding a permanent parenting plan will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Id*.

[8] Older decisions from our courts refer to custody or visitation agreements, however, we now refer to such arrangements as parenting plans or parenting schedules; the cases cited, however, remain on point for the substantive law.

SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES

The threshold issue in modification proceedings is whether a material change in circumstances affecting the child's best interest has occurred since the adoption of the existing parenting plan. Tenn. Code Ann. § 36-6-101(a)(2); *see Kendrick*, 90 S.W.3d at 570. As a result of changes to the statutory scheme, proof that a material change of circumstance has occurred no longer requires proof of "a substantial risk of harm to the child." *Id*. For purposes of modification of the designation of the primary residential parent, the petitioner has the burden to prove by a preponderance of the evidence a material change of circumstance, which may include, but is not limited to, "failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child." *Id*.

The law on this issue is well-settled; nevertheless, the unique facts of this case make the application of these standards more problematic. Specifically, we are referring to the fact that the "temporary" change of the primary residential parent, which was made in September 2006, had been in effect for two years when the final hearing on Father's petition for modification concluded in September 2008. The inordinate amount of time that passed while Father was the primary residential parent, albeit on a "temporary" basis, and the child's reliance on the new status quo requires us to examine the applicable legal principles in the context of these unique facts.

Despite the passage of time and the temporary but significant changes in the parenting plan, Father still bears the burden of proof to establish that a change in material circumstances occurred since the entry of the Permanent Parenting Plan in the Final Decree of Divorce. This is because

> [t]he law makes a distinction between temporary and final orders of custody. "An interim order is one that adjudicates an issue preliminarily; while a final order fully and completely defines the parties' rights with regard to the issue, leaving nothing else for the trial court to do." Trial courts have discretion to grant temporary custody arrangements in circumstances "where the trial court does not have sufficient information to make a permanent custody decision or where the health, safety, or welfare of the child or children are imperiled."

E.J.M. v. Brown ("E.J.M. I"), No. W2003-02603-COA-R3-CV, 2005 WL 562754, at *18 (Tenn. Ct. App. Mar. 10, 2005) (quoting *Warren v. Warren*, No. W1999-02108-COA-R3-CV, 2001 WL 277965, at *4 (Tenn. Ct. App. Mar. 12, 2001) (citations omitted)).

Thus, even if a "temporary" or pendente lite modification remains in place over a significant period of time, the change of circumstance relates back to the judgment to be modified, in this case the final decree, not a temporary, pendente lite order. *See id.* at *17 (citing *Spatafore v. Spatafore*, No. E2001-02459-COA-R3-CV, 2002 WL 31728879, at *2 n.1 (Tenn. Ct. App. Dec. 5, 2002) (noting that, although there had been temporary modifications in custody, "the decree which must be analyzed to see whether a material change in circumstances has occurred is the initial custody decree"); *Phillips v. Phillips*, No. W2001-01685-COA-R3-CV, 2002 WL 927514, at *2 (Tenn. Ct.

App. May 2, 2002) (stating that "only the Final Order, which adopted the Permanent Parenting Plan, should be considered a final decree"); *Placencia v. Placencia*, 3 S.W.3d 497, 499-500 (Tenn. Ct. App. 1999) (placing the burden of showing a change in circumstances on the mother, the non-custodial parent, despite the fact that the court gave her temporary custody pending a final resolution of the custody issue)).

In *Gorski v. Ragains*, No. 01A01-9710-GS-00597, 1999 WL 5114514 (Tenn. Ct. App. July 21, 1999), this Court addressed a protracted temporary, but major, change in the parenting plan that is not dissimilar to the facts of this case. In the divorce decree, the mother, Ms. Ragains, was designated as the primary residential parent. *Id*. at *1. Shortly after the divorce, Ms. Ragains experienced an "emotion tailspin," and the father, Mr. Gorski, filed a petition to name himself as the primary residential parent. *Id*. As is the case here, before the trial court could conduct a full evidentiary hearing on the father's petition, the court modified the parenting plan in a substantial fashion by temporarily giving the parties equal parenting time. A few months thereafter, and again before a full evidentiary hearing could be conducted, the trial court again modified the parenting plan, this time by designating father as the primary residential parent. *Id*. This temporary change in the parenting plan stayed in effect for the next two years. *Id*. at *2. Thus, when the father's petition for modification of the parenting plan came on for final hearing, he had been primarily responsible for the children for two years. *Id*.

The *Gorski* court addressed the unusual predicament presented by the inordinate amount of time the temporary but substantial changes in the parenting plan had been in effect before the final hearing on the petition:

> No one-dimensional statement of the applicable legal rules can resolve this particular case. Real world complexity steals into the equation when we consider, as we must, that events and lives have not stood still while this custody dispute has been in the courts. At this stage of the proceeding, we cannot ignore the fact that all the parties' circumstances are not the same as they were when they were last before the trial court.
>
> Drawing from common sense observation, experience, and child development theory, child custody law places a value on continuity and stability in children's lives. Our decisions reflect this belief. *See, e.g., Taylor v. Taylor*, 849 S.W.2d 319, 328 (Tenn. 1993); *Adelsperger v. Adelsperger*, 970 S.W.2d at 485; *Contreras v. Ward*, 831 S.W.2d 288, 290 (Tenn. Ct. App. 1991). Thus, while human behavior rarely lends itself to neatly drawn lines of direct cause and effect,
>
> > The notion is that to grow and flourish a child is entitled to and needs the security of a permanent place with permanent ties to a parent figure; moreover, even occasional environmental or familial changes, as well as the threat or fear of such changes, will undermine the

> child's sense of stability and therefore the child's comfort and security.
>
> National Interdisciplinary Colloquium on Child Custody, *Legal and Mental Perspectives on Child Custody Law: A Deskbook for Judges*, § 20:1, at 238 (1998).

Gorski, 1999 WL 5114514, at *4-5. The court went on to note the importance of a "prompt resolution of custody matters" in order to aid the children with stability and continuity. *Id*. at *5. As the court explained, one danger of allowing a temporary but substantial change in a post-divorce parenting plan to remain in effect for an extended period is its ability to "destabilize the equation" for modifying the preexisting permanent parenting plan. *Id*. at *6. The *Gorski* court further explained that temporary changes that are permitted to remain in effect for protracted periods "will insidiously shift the momentum in the case to the temporary custodian."*Id*. (citing *e.g., Bjork v. Bjork*, No. 01 A01-9702-CV-00087, 1997 WL 653917, at *2-6 (Tenn. Ct. App. Oct. 22, 1997)) This circumstance, the court commented, created a "new status quo" that enables the parent with temporary custody "to establish a track record that heightens his or her chances of obtaining permanent custody." *Id*. (citing *King v. King*, No. 01 A01-9110-PB-00370, 1992 WL 301303, at *2 Tenn. Ct. App. Oct. 23, 1992)). In its analysis of the pertinent facts, the *Gorski* court noted that it could not "ignore the extended period of time these children have spent with [the father]," and although the mother had corrected many of the issues that had been cited in the original petition as material changes, "the most striking change in the children's circumstance is that the children had been living with [the father] rather than [the mother]" for an extended period of time when the case came on for final hearing. *Id*. In the final analysis, the *Gorski* court held that this was clearly an unforeseen circumstance and constituted a material change in circumstance sufficient for the Father to have met his burden in the case. *Id*.

In the case before us, the material changes alleged in the original petition included the facts that Mother unilaterally withdrew the child from daycare, that she moved with the child to another county and refused to disclose to Father where the child was living, and that Mother was in financial stress and unable to provide a stable home for the minor child for a period of time. By the time of the final hearing, which was two years later, Mother had returned to Nashville, and she had been gainfully employed for most of that time; however, she did not pay child support as ordered, nor was she paying the car note as ordered.

A material change of circumstance may include "failures to adhere to the parenting plan . . . or circumstances that make the parenting plan no longer in the best interest of the child." Tenn. Code Ann. § 36-6-101(a)(2)(B). When determining whether a material change in circumstances has occurred, the following factors are considered an appropriate basis for holding that a material change in circumstances has occurred: (1) the change occurred "after the entry of the order sought to be modified," (2) the change was "not known or reasonably anticipated when the order was entered," and (3) the change "affects the child's well-being in a meaningful way." *Kendrick*, 90 S.W.3d at 570 (quoting *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)); *see also Dalton v. Dalton*, 858

S.W.2d 324, 326 (Tenn. Ct. App. 1993) (holding a change of circumstances affecting the welfare of the child may include any "new facts or changed conditions that could not be anticipated by the former decree").

Considering the importance of maintaining continuity and stability in a child's life, we cannot ignore the past two years of the child's life during which Father has been the primary care-giver and supporter of the child. We also cannot ignore the fact that soon after the entry of the permanent parenting plan in May 2006, Mother engaged in conduct that justified an immediate change in the parenting plan, specifically the designation of Father as the primary residential parent on a temporary basis. For reasons not fully explained by the record, Mother allowed the "status quo" to change in a material way by failing to timely file an Answer to Father's petition for modification and failing to promptly request a final hearing on the petition. During the two years the petition was pending, Mother apparently achieved greater financial stability and returned to Nashville, thereby remedying some of the changed circumstances that justified the immediate designation of Father as the temporary primary residential parent. Nevertheless, Mother's noncompliance with the parenting plan following the divorce and the placement of the child in Father's care for a period of two years were clearly unforeseen changes that occurred after the entry of the order Father seeks to modify, and these unforeseen changes constitute substantial and material changes in circumstances. *See Kendrick*, 90 S.W.3d at 570; *Gorski*, 1999 WL 511451, at *6. Accordingly, we affirm the trial court's finding that Father carried his burden of proof by establishing that substantial and material changes in circumstances have occurred that affect the child's best interests.

BEST INTERESTS OF THE CHILD

Once the court determines that substantial and material changes in circumstances occurred that affect the child's best interests, the court must then determine whether modification of the parenting plan is in the child's best interests and, if so, to fashion a plan that is in the child's best interests. *Kendrick*, 90 S.W.3d at 570. Whether modification of an existing parenting plan is in the child's best interests should be determined based on the factors set forth in Tennessee Code Annotated § 36-6-106:

> (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
>
> (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
>
> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that, where there is a finding, under subdivision (a)(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and

> that a nonperpetrating parent or caregiver has relocated in order to flee the perpetrating parent, that the relocation shall not weigh against an award of custody;
>
> (4) The stability of the family unit of the parents or caregivers;
>
> (5) The mental and physical health of the parents or caregivers;
>
> (6) The home, school, and community record of the child;
>
> . . . .
>
> (9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and
>
> (10) Each parent or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.

Tenn. Code Ann. § 36-6-106(a)(1)-(6), (9)-(10) (2008).

The trial court found that the following factors weighed in favor of Father: the love, affection, and emotional ties existing between the parent and child; the disposition of the parent to provide the child with food, clothing, medical care, education, and necessary care; the degree to which a parent has been the primary caregiver; the importance of the continuity in the child's life; stability of the family; the home, school, and community record of the child; and third party support. The court found that child's mental and physical health weighed equally in favor of both parents.

Father has been the primary care-giver for the child and has provided a stable environment for the child the past two years. Despite obtaining stable employment soon after she returned to Nashville from Lewisburg, and with the exception of two court-ordered child support payments which were remitted long after they were due to be paid to Father, Mother failed to provide financial support for the child during the time the child has been with Father. These factors weigh substantially in Father's favor. Having reviewed the other factors considered by the trial court, we find the evidence does not preponderate against the trial court's findings relative to the statutory factors in Tenn. Code Ann. § 36-6-106. Accordingly, we affirm the trial court's conclusion that it is in the child's best interests for Father to be designated the primary residential parent.

The change in the designation of the primary residential parent necessitated a change in the parenting plan and parenting time. The trial court elected to adopt the parenting plan submitted by Father, which affords Father a disproportionately greater amount of residential time with the child. Mother made improvements during the two years the child was residing with Father to stabilize her life and to better fulfill her parental duties, however, she was still deficient in fulfilling her parental

duties in some respects, including failing to financially support the child. Although we may have been inclined to adopt a parenting plan that afforded Mother more parenting time, especially in the summer months when the child is out of school, it is not the role of the appellate courts to "tweak" parenting plans in the hopes of achieving a more reasonable result than the trial court. *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). Trial courts have broad discretion in devising permanent parenting plans based on the unique circumstances of the case. *Burton v. Burton*, No. E2007-02904-COA-R3-CV, 2009 WL 302301, at *2 (Tenn. Ct. App. Feb. 9, 2009) (citing *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999)); *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Decisions regarding parenting schedules often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Thus, a trial court's decision regarding a permanent parenting plan will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge*, 42 S.W.3d at 88. We do not believe the decision regarding the parties' parenting plan falls outside of this spectrum. Accordingly, we affirm the permanent parenting plan as adopted by the trial court.

CONTEMPT

In his petition, Father asked the court to hold Mother in contempt for failing to indemnify and hold Father harmless from liability on the indebtedness owed on the vehicle awarded to her in the divorce. At the time of the divorce, the vehicle awarded to Mother was encumbered, and both parties were jointly liable on the obligation. The encumbered vehicle, a 2005 Chevrolet Blazer, was awarded to Mother in the Marital Dissolution Agreement "free and clear of any interest" of Father, and Mother was ordered to indemnify and hold Father harmless from any liability thereon. It is undisputed that Mother failed to make payments on the vehicle, that the vehicle was repossessed by the lien holder, that Father has received numerous notices demanding payment on the outstanding debt, and that Mother was employed during most of the time relevant to this issue.

The trial court held Mother in civil contempt for failing to pay the indebtedness owed on the vehicle; however, the trial court did not make any findings of fact regarding whether her actions were willful or whether she had the ability to pay the obligation. Moreover, there are no findings of fact regarding the amount of the payments which were to be made on the vehicle, the amount of Mother's income during the relevant period, or her other obligations. The trial court awarded a judgment in favor of Father against Mother in the amount of $11,383.82, which was the outstanding debt on the vehicle.

On appeal, Mother contends the trial court erred in finding her in contempt because the decree was ambiguous. She also contends the contempt finding was error as there are no findings by the court that her actions were willful or that she had the ability to pay the obligation.

THE FOUR REQUISITE FACTORS OF CONTEMPT

Our Supreme Court enumerated the four factors that must be shown in order to make a finding of civil contempt in *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346 (Tenn. 2008). They are:

> First, the order alleged to have been violated must be "lawful." Second, the order alleged to have been violated must be clear, specific, and unambiguous. Third, the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order. Fourth, the person's violation of the order must be "willful."

Konvalinka, 249 S.W.3d at 354-55 (footnotes omitted). After determining that a person has willfully violated a lawful and sufficiently clear and precise order, the court may, in its discretion, hold the person in civil contempt. *Id*. at 358 (citing *Robinson v. Air Draulics Eng'g Co.,* 377 S.W.2d 908, 912 (1964)). The court's decision is entitled to great weight, and decisions to hold a person in civil contempt are reviewed using the abuse of discretion standard of review. *Id*. (citing; *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn. 1993); *Moody v. Hutchison*, 159 S.W.3d 15, 25-26 (Tenn. Ct. App. 2003; *Hooks v. Hooks*, 8 Tenn. Civ. App. (Higgins) 507, 508 (1918)). "This review-constraining standard does not permit reviewing courts to substitute their own judgment for that of the court whose decision is being reviewed." *Id.* (citing *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)) (footnote omitted).

A LAWFUL ORDER

The threshold issue for determination in any contempt proceeding is whether the order alleged to have been violated is lawful. *Konvalinka*, 249 S.W. 3d at 355. "A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties." *Id*. (citing *Vanvabry v. Staton*, 12 S.W. 786, 791 (1890); *Churchwell v. Callens*, 252 S.W.2d 131, 136-37 (1952)). The provision at issue was originally contained in the Marital Dissolution Agreement, agreed to by the parties, and incorporated into the Divorce Decree. It was a lawful order.

THE ORDER MUST BE CLEAR, SPECIFIC, AND UNAMBIGUOUS

The second issue pertains to the clarity of the order. *Konvalinka*, at 355. "A person may not be held in civil contempt for violating an order unless the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden." *Id*. (citing *Sanders v. Air Line Pilots Ass'n Int'l*, 473 F.2d 244, 247 (2d Cir. 1972); *Hall v. Nelson*, 651 S.E.2d 72, 75 (Ga. 2007); *Marquis v. Marquis*, 931 A.2d 1164, 1171 (Md. Ct. Spec. App. 2007); *Cunningham v. Eighth Judicial Dist. Ct. of Nev.*, 729 P.2d 1328, 1333-34 (Nev. 1986); *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, 643 S.E.2d 151, 154-55 (Va. 2007)). "The order must, therefore, be clear, specific, and unambiguous." *Id*. (citing *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d at 471; *Long v. McAllister-Long*, 221 S.W.3d 1, 14 (Tenn. Ct. App. 2006)).

In this case, the Marital Dissolution Agreement stated: "Wife shall be awarded all right, title and interest in and to the 2005 Chevrolet Trailblazer . . . free and clear of any interest of Husband, and subject to any indebtedness owed thereon, indemnifying and holding Husband harmless from any liability thereon." Mother argues that this provision is ambiguous because no time frame was given for paying the indebtedness and no actions for Mother to take were stated. She argues that because the order failed to specify that she needed to make payments on the vehicle, it was ambiguous. We find no merit to this argument.

The provision clearly stated that Mother was required to "indemnify" Father and hold him harmless from liability on the vehicle. She has failed to do that. This Court addressed a factually similar scenario in *Long v. McAllister-Long*, 221 S.W.3d 1 (Tenn. Ct. App. 2006). In that action, the terms of the Marital Dissolution Agreement awarded the marital residence to the husband, Mr. Long, and a 2000 Jaguar to the wife, Ms. McAllister, and required Mr. Long to pay the debts on these items, while holding Ms. McAllister harmless. *Id*. at 6. Mr. Long failed to make timely payments on the items, resulting in Ms. McAllister receiving notices from creditors. *Id*. Thereafter, she filed a motion for criminal contempt against Mr. Long for his failure to pay the debts and hold her harmless alleging that the failure to do so had damaged her credit standing. *Id*. The trial court dismissed the petition finding that the marital dissolution agreement did not require Mr. Long to make any mortgage payments, and while he was required to make payments on the Jaguar, he was not required to do so in a timely manner. *Id*. at 7. The court also found that the harm alleged was conclusory, and, therefore, the petition was defective. *Id*. Ms. McAllister appealed, and on appeal, Mr. Long, *inter alia*, argued that the marital dissolution agreement did not require him to pay his share of the marital debts in a timely manner. *Id*. at 8. This Court rejected Mr. Long's "cramped interpretation of the divorce decree" and reversed the trial court's dismissal of the petition. *Id*.

In the *Long* decision, we noted that "divorcing parties frequently use a marital dissolution agreement as the vehicle for dividing their marital estate," that these agreements are "contractual," and, therefore, once the trial court approves them, "they become legally binding obligations on the parties." *Id*. at 8-9. With two notable exceptions, the agreements in a marital dissolution agreement are enforceable contract obligations. *Id.* The significance of the contractual analogy is that, like other contracts, a marital dissolution agreement, contains "an implied covenant of good faith and fair dealing." *Id*. at 9. The court went on to state

> The plain language of the agreement required [Husband] not only to pay these debts but also to hold [Wife] harmless should he fail to do so. Because the marital dissolution agreement obligates [Husband] to deal with [Wife] fairly and in good faith, his "hold harmless" obligation arose before the parties' creditors required [Wife] to pay the debts that had been assigned to [Husband]. The agreement required [Husband] to pay these debts in a timely manner in order to prevent [Wife] from being harmed. Receiving dunning letters and risking adverse effects on her credit rating are among the types of harm that entitle [Wife] to ask the trial court to enforce [Husband's] obligations to pay the debts the marital dissolution agreement required him to pay.

Long, 221 S.W.3d at 12.

As the *Long* case makes clear, although inartfully drafted, the provision in the marital dissolution agreement requiring Mother to "indemnify" and hold Father harmless clearly places the responsibility on Mother to timely pay the debt on the vehicle to avoid it going into default. We, therefore, reject this aspect of Mother's argument and find that the provision in the marital dissolution agreement was "clear, specific, and unambiguous." *See Konvalinka*, 249 S.W.3d at 355 (citing *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d at 471; *Long*, 221 S.W.3d at 14).

WAS THE ORDER VIOLATED?

The next issue is whether the party facing the civil contempt actually violated the order. *Konvalinka*, 249 S.W.3d at 356. This is a factual issue to be decided by the court without a jury. *Id.* (citing *Pass v. State*, 184 S.W.2d 1, 4 (1944); *Sherrod v. Wix*, 849 S.W.2d 780, 786 (Tenn. Ct. App. 1992)). The court must find that the person actually violated a court order by a preponderance of the evidence. *Id*. (citing *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d at 474). Thus, decisions regarding whether a person actually violated a court order should be reviewed in accordance with the standards in Tenn. R. App. P. 13(d), which requires a de novo review upon the record of the trial court, accompanied by a presumption of the correctness of the finding unless the preponderance of the evidence is otherwise. *Id*. Mother admitted that she stopped making payments on the vehicle, that the note went into default, and that the vehicle was repossessed. Father testified that he received numerous inquiries from creditors regarding the outstanding balance on the vehicle, although he has not yet been required to make any payments on the indebtedness. Although Father has not yet made any payments, Mother violated the order by not making timely payments and allowing the note to go into default.

WAS THE VIOLATION WILLFUL?

The fourth and final factor is whether the violation of the order was a willful act. *Konvalinka*, 249 S.W.3d at 356-57. "The word 'willfully' has been characterized as a word of many meanings whose construction depends on the context in which it appears." *Id*. at 357(citing *Spies v. United States*, 317 U.S. 492, 497 (1943); *United States v. Phillips*, 19 F.3d 1565, 1576-77 (11th Cir. 1994)). "[I]t differentiates between deliberate and unintended conduct." *Id*. (citing *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d at 612). "[W]illful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent." *Id*. If a person knows what he or she is doing and intends to do what he or she is doing, then that person is acting willfully. *Id*. (citing *State ex rel. Flowers*, 209 S.W.3d at 612). "Thus, acting contrary to a known duty may constitute willfulness for the purpose of a civil contempt proceeding." *Id*. (citing *United States v. Ray*, 683 F.2d 1116, 1127 (7th Cir. 1982); *City of Dubuque v. Iowa Dist. Ct. for Dubuque County*, 725 N.W.2d 449, 452 (Iowa 2006); *Utah Farm Prod. Credit Ass'n v. Labrum*, 762 P.2d 1070, 1074 (Utah 1988)).

Because the willful act alleged pertains to Mother's failure to satisfy a financial obligation, it must also be established that the contemptuous person had the ability to pay the obligation. *See Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000).

As Mother correctly contends, there was no finding by the court that her actions were willful and no finding that she had the ability to pay the car note. Moreover, there are no findings regarding the amount of the monthly obligation on the vehicle and there are no findings regarding Mother's income or available assets at the time the payments were due. The burden of proof was on Father to establish that Mother had the ability to make the financial payments when they became due and that she willfully failed or refused to make the payments. There is no evidence in this record upon which to base such findings. Accordingly, we reverse the judgment of the trial court finding Mother in contempt of court.

THE $11,383.82 JUDGMENT

The trial court awarded a judgment in favor of Father against Mother in the amount of $11,383.82. Although Father has the right to be indemnified by Mother for any damages he suffers as a result of her failure to satisfy the obligation on the car note, the record reveals that Father has not paid any of the indebtedness owing on the note. Father has not sustained a loss of $11,383.82; thus he is not entitled to a judgment in that amount. We recognize that Father is at risk of being held liable on the note; however, he had not been held liable and had not paid any amount on the note as of the date of trial; therefore, the judgment against Mother in the amount of $11,383.82 is reversed.

IN CONCLUSION

The judgment of the trial court is affirmed in part, and reversed in part, and this matter is remanded with costs of appeal assessed against the parties equally.

_____
FRANK G. CLEMENT, JR., JUDGE